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**In The**

**SUPREME COURT OF THE UNITED STATES**

October Term, 1998

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IN RE ANN ALDRICH, DISTRICT JUDGE

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On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

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# PETITION OF DISTRICT JUDGE ANN ALDRICH FOR WRIT OF CERTIORARI

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45 pp

## QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals apply the correct legal criteria for mandamus when it issued an order vacating a District Court discovery ruling, in an inmate's civil rights case, where the original discovery ruling adhered carefully to existing case law and to the Federal Rules of Civil Procedure and where the subsequent mandamus order formulated a new discovery rule not found in the Federal Rules of Civil Procedure or prior case law?

2. Did the Circuit Court of Appeals erroneously interfere with the District Court's case management responsibilities when it issued a mandamus order stating that, in inmate civil rights cases, district courts are required to defer to a state department of correction's unpublished "general rule of non-attendance," forbidding virtually all inmate litigants from attending any depositions of corrections staff members?

## THE PARTIES

The parties to these proceedings are: District Judge Ann Aldrich, respondent in the mandamus proceeding below; Inmate Plaintiff Joseph Smith, respondent below; Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Correction, petitioner below; Janice Yarrow, Lois Rathwell-Love, Dr. Francisco Leano, Roberta Winkle, Marla Armstrong, Bennie Kelly, and Norm Rose, employees of the Ohio Department of Rehabilitation and Correction and petitioners below.[1]

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[1]District Judge Ann Aldrich has filed her petition for certiorari as a party in this mandamus case. When the proceedings were initiated, Judge Aldrich was served as a respondent under Rule 21 of the Federal Rules of Appellate Procedure. On December 21, 1996, after she was served, amendments to Rule 21 became effective. Rule 21(a)(1) now provides that "[a]ll parties to the proceeding in the trial court other than the petitioner are respondents for all purposes." Rule 21(b)(4) also provides that "[t]he court of appeals may invite or order the trial judge to respond...." The Sixth Circuit Court of Appeals invited the District Judge to file a response and she did so on November 7, 1996. Her attorney subsequently filed an appearance and briefed and argued the case.

If, in light of the amendments to Rule 21, this Court does not deem Judge Aldrich to be a party to this case, she requests that this petition be treated as an *amicus curiae* brief. She can be of assistance to this Court as *amicus* because the Sixth Circuit's ruling delegates significant authority over the conduct of discovery to corrections administrators. Judge Aldrich's experience as a district judge gives her a perspective on important questions of case management that are posed by the Sixth Circuit's ruling. Additionally, the Sixth Circuit's grant of mandamus was pursuant to criteria which are not followed by some of the other circuits. She believes the Sixth Circuit's standard encourages the filing of mandamus petitions to address routine discovery matters. Her participation as *amicus* will permit her to address that question. The Plaintiff and Defendants have consented to the filing of an *amicus* brief by Judge Aldrich. The consents will be supplied to the Clerk, upon request.

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**In The**
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IN RE ANN ALDRICH, DISTRICT JUDGE

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner Ann Aldrich, District Judge for the District Court of the Northern District of Ohio, respectfully requests that a writ of certiorari issue to review the mandamus order and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 5, 1998.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported as *In re Wilkinson,* 137 F.3d 911 (6th Cir. 1998), rehearing and suggestion for rehearing *en banc* denied June 17, 1998. It is reprinted in the appendix of this petition at page A1. The opinion of the District Court is unpublished and is printed in the appendix at A24.

## JURISDICTION

The discovery order that is the subject of these mandamus proceedings was entered by the District Court on August 26, 1996. The Court of Appeals entered its order and opinion

granting the petition for a writ of mandamus and vacating the District Court's discovery order on March 5, 1998. A petition for rehearing with a suggestion for rehearing *en banc* was denied on June 17, 1998. The time to file a petition for a writ of certiorari in this Court was extended to November 14, 1998, pursuant to Application No. 171 in *Smith v. Wilkinson, et al.* This Court has jurisdiction to review the final order entered by the Court of Appeals for the Sixth Circuit under the provisions of 28 U.S.C. § 1254.

## THE FEDERAL RULES OF CIVIL PROCEDURE AT ISSUE IN THIS CASE

Rule 26(c): Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * * * *

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

* * * * *

(5) that discovery be conducted with no one present except persons designated by the court;

Rule 30(b)(1): A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

## STATEMENT OF THE CASE

### A. The Court of Appeals' Mandamus Ruling.

The Court of Appeals for the Sixth Circuit granted a petition for writ of mandamus in this case on the ground that District Judge Ann Aldrich abused her discretion by granting the motion of the Inmate Plaintiff's Counsel to allow their client to be present at depositions of four staff members of Ohio Department of Rehabilitation and Correction (ODRC). One judge dissented. According to the Circuit's majority opinion, Judge Aldrich's discovery order was an abuse of discretion because she had failed to defer to ODRC's unpublished "general rule of non-attendance" which prohibits all inmates from attending depositions of members of the corrections staff. The Circuit also rejected Judge Aldrich's determination that, under the particular circumstances of this case, presence of the plaintiff at the depositions to assist his counsel would be in the best interest of a fair and efficient adjudication of his claims. Finally, it rejected the District Court's determination that the ODRC

objection to the Plaintiff's attendance was governed by the requirement of Federal Rule 26(c) which requires objections to a party attending a deposition to be supported by a showing of "good cause" as to why the party should not be allowed to attend a deposition. It was the Circuit's view that the ODRC had no burden of justification because the District Court was obliged to defer to the ODRC "general rule of non-attendance." App. A8-A9.

Circuit Judge Nathaniel Jones dissented on the ground that a writ of mandamus should not have issued because the District Judge had dutifully applied the balancing test previously articulated by the Circuit in *In re Collins,* 73 F.3d 614 (6th Cir. 1995)[2], and had complied with Rule 26(c) and Rule 30 of the Federal Rules of Civil Procedure. He stated that while inmate plaintiffs differ from other civil plaintiffs, the majority erred because the ODRC showing of "generalized security concerns" was not specific to the Plaintiff in the pending case. He also stated that the Federal Rules do not authorize placement of a special burden on an inmate plaintiff to demonstrate special circumstances requiring his or her attendance at a deposition. App. A15-A16.

**B. The Proceedings Below.**

The Sixth Circuit's mandamus arose out of *pro se* civil rights cases filed by inmate Joseph Smith against ODRC officials. These cases are currently pending before District Judge Aldrich. The complaints allege that Plaintiff, an inmate at the Lorain Correctional Institution (LorCI), developed acute hernias after being given job assignments requiring heavy lifting. According to the Plaintiff's complaints, after Plaintiff was assigned to work

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[2]*In re Collins* is reprinted in the Appendix at App. A19.

at the prison library, Defendant Yarrow, the prison librarian, was informed of Plaintiff's medical condition and of a medical order that he do no heavy lifting. The complaints also allege that Defendant Yarrow ignored his medical condition and the medical order by ordering him to lift and move heavy bookshelves to clean behind them. He was also allegedly ordered to move a filing cabinet to the back of the library, to carry mail buckets, to carry a typewriter, and to carry a "michfich copier/reader" (*sic*). The heavy lifting allegedly aggravated his medical condition to a significant degree. His complaints also allege that when he filed administrative complaints and lawsuits complaining of his treatment, Defendants retaliated by forbidding him from using the law library. Finally, the complaints allege that the Plaintiff did not receive all of the surgery necessary to treat his medical condition.[3]

During the course of discovery, Plaintiff's counsel scheduled depositions of certain corrections employees for April 26, 1996, at LorCI, where the Plaintiff was incarcerated The location was selected so that the Plaintiff could attend the depositions and assist his attorneys with no inconvenience to the Defendants. On April 24, 1996, two days prior to the depositions, counsel for the Defendants informed Plaintiff's counsel, by telephone, that the Plaintiff would not be allowed to

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[3] On April 19, 1995, the District Court appointed Robert D. Gary to represent the Plaintiff. On June 5, 1995, the Defendants had filed motions for summary judgment seeking dismissal of all of the cases pending before Judge Aldrich. On February 9, 1996, the judge entered "Case Management Plan/Order[s]" which set a discovery cut-off date, set a trial date, and denied the Defendant's motion to dismiss, without prejudice. She also consolidated the Plaintiffs' cases that were pending before her and provided that the Defendants could refile their motion for summary judgment on or before May 7, 1996, after appointed counsel had an opportunity to complete some discovery on the newly consolidated cases.

attend the depositions because he had an attitude problem. Plaintiff's counsel then filed a motion to compel Defendants to permit Plaintiff to be present at the depositions.

Defendants opposed Plaintiff's attendance at the depositions on the ground that ODRC has a rule against permitting inmate parties to attend depositions of corrections employees. This rule, which is unpublished, was invoked on the ground that no inmate should ever be permitted to attend a deposition of a member of the corrections staff. Warden Larry Seidner is the only person, other than the director of ODRC, authorized to determine whether an inmate at LorCI may attend a deposition. Defendants supported this policy in the courts below by submitting affidavits of a consultant and corrections administrators. According to the affidavit of consultant James G. Ricketts, the presence of inmates at depositions of staff members "will likely undermine staff confidence," creating emotions that "will not be pleasant for the staff members," App. A38-A39. It also stated that the presence of inmates at depositions will "make staff members more reticent to exercise their lawful authority." (*Id.*) In addition, the Ricketts affidavit stated that inmate-initiated cases are generally frivolous and are usually filed to harass corrections officers. (*Id.*) The only affidavit that contained information specific to the Plaintiff stated that Plaintiff is "far more litigious than most inmates at LorCI" and is a security risk because he is "aggressively litigious." App. A41-A42.

After considering the submissions of the parties, the District Court conscientiously applied the Circuit's balancing test, which was then in effect for determining whether an inmate could attend a deposition of a corrections official. *In re Collins*, 73 F.3d 614 (6th Cir. 1995). App. A19. Using this balancing test, the District Court found that, under the circumstances of this

case, Plaintiff should be allowed to attend. In particular, she found that the inmate's presence at the deposition would be of assistance to his attorneys because of his personal knowledge of relevant facts and would, therefore, contribute significantly to the fair adjudication of his claims. App. A26, A28. In addition, the District Court found that the Defendants' opposition was premised on a generalized claim of institutional security and was not based on facts specific to the Plaintiff, claims of misconduct, or his pending case. She rejected the ODRC allegation that the Plaintiff's litigiousness justified excluding him from the depositions, and found there was no evidence that Smith has a history of violent or disruptive behavior. She also rejected Defendants' claim "that an inmate who continually files civil rights lawsuits is a security risk to an institution." App. A27.

On October 18, 1996, shortly after the District Court granted the Plaintiff's motion to attend the depositions of certain defendants, ODRC officials filed their mandamus petition. The Defendants' petition for the writ of mandamus was granted on March 5, 1998, and a petition for rehearing *en banc* was denied on June 17, 1998.

## WHY THE PETITION SHOULD BE GRANTED

District Judge Ann Aldrich respectfully requests that certiorari be granted in this case because it raises important issues concerning the authority of the District Court to manage discovery in civil cases pending before it. Further, the Sixth Circuit's decision in this case is based on a permissive standard for the issuance of mandamus orders which is inconsistent with this Court's prior rulings and reflects differences among the circuits over the correct standard to apply. In addition, the Circuit's ruling improperly fashions a new rule of discovery for use in prison litigation which delegates power over the

management of discovery to interested prison officials and does not conform with the Federal Rules of Civil Procedure.

## I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DIFFERENCES AMONG THE CIRCUITS CONCERNING THE CORRECT CRITERIA TO APPLY IN DETERMINING WHEN A PETITION FOR A WRIT OF MANDAMUS SHOULD BE GRANTED.

The mandamus order vacating the District Court's discovery ruling was issued erroneously because the Sixth Circuit Court of Appeals used mandamus criteria which are far too lenient and which are not used by all of the Circuit Courts of Appeals. Instead of requiring that there be a genuine abuse of discretion by the District Court, the Circuit issued the writ of mandamus because it determined that a newly enunciated standard should be applied retroactively to the discovery dispute in this case. Under the Circuit's new "general rule of non-attendance," in virtually any case where an inmate's attorney requests that the inmate attend a deposition of a corrections officer to assist the attorney, a district court is required to defer to state prison policies forbidding inmate attendance. Under the circumstances of this case, however, there could be no abuse of discretion because the District Court had conscientiously and correctly applied the balancing test that was in force at the time of its discovery ruling.

The source of the Circuit's error was its failure to recognize that a mere disagreement between the Circuit Court and the District Court over an existing legal rule or a new legal rule governing discovery is not a proper basis for the issuance of a writ of mandamus. *Will v. United States*, 389 U.S. 90, 95 (1967). Additionally, in issuing the writ, the Circuit used

permissive mandamus criteria which authorize mandamus orders under circumstances which fall short of the genuine abuse of discretion required by this Court and some of the other Circuits. Cf. *Will v. United States*, *supra*, and *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

### A. The Disagreement over the Correct Legal Standard Governing the Discovery Dispute.

It is clear from the record in this case that the mandamus order was based on a disagreement between the Circuit Court and the District Court over what legal standard should apply to the discovery motion made by the Plaintiff's Counsel. The District Court had decided the discovery motion on August 26, 1996 by conscientiously applying the Federal Rules and *In re Collins, supra,* decided by the Circuit one year previously. App. A25. As the opinion filed by the District Court shows, the District Court engaged in a two-step process which adhered to existing law. First, the District Court applied the Circuit's five factor, case-by-case balancing test articulated in *Collins*. Second, it applied the specific language of Rule 26(c). Based on the Circuit's test, and the lack of information showing that the Plaintiff would misbehave or act inappropriately, the District Court granted the motion to permit the Plaintiff to attend certain depositions because his presence to assist counsel was in the best interest of effective case management.

In spite of the District Court's careful compliance with applicable law, the Court of Appeals concluded that the District Court had abused its discretion by not deferring to the ODRC "general rule of non-attendance." Yet, there was no abuse of discretion. The "general rule of non-attendance" was an unpublished rule. And, the requirement of deference was not adopted by the Circuit until the mandamus ruling in this case,

two years after the District Court entered its discovery order. Thus, the result of the Sixth Circuit's ruling was to require a degree of deference to the corrections officials' policies governing discovery matters which superceded the Circuit's prior case authority.

### B. The Differences Among the Circuits' Mandamus Criteria.

In order to base a writ of mandamus on its disagreement with the District Court over the applicable legal standard, the Circuit employed criteria for issuance of a mandamus order which are far more permissive than those employed by this Court and some of the other Courts of Appeals. As the Sixth Circuit's opinion in this case points out, when deciding mandamus cases, the Circuit employs the permissive criteria articulated *In re Parker*, 49 F.3d 204 (6th Cir. 1995). App. A4. According to *Parker*:

> The Sixth Circuit has adopted a five-step process for examining whether there are extraordinary circumstances warranting mandamus relief. *In re Bendectin Products Liab. Litig.*, 749 F.2d 300, 303-304 (6th Cir. 1984). The five steps are: 1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief needed; 2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; 3) whether the District Court's order is clearly erroneous as a matter of law; 4) whether the District Court's order is an oft-repeated error, or manifests a persistent disregard of the Federal Rules; 5) whether the District Court's order raises new and important problems, or issues of law of first impression. The factors are

> cumulative and should be balanced; they may not all point to the same conclusion. Id at 304. Furthermore, the absence of any factor is not controlling.

49 F.3d at 206.[4] The *Parker* criteria, which were originally articulated by the Ninth Circuit in *Bauman v. United States*, 557 F.2d 650, 653-655 (9th Cir. 1977), have never been adopted by any decisions of this Court and are not followed by all of the circuits. See 20 *Moore's Federal Practice* § 321.13[4] (1998). The permissiveness of the *Parker* criteria arises from the fact that while there are five criteria, "they may not all point to the same conclusion" and "the absence of any factor is not controlling." 49 F.3d at 206. As a consequence, under *Parker*, the Sixth Circuit is free to issue a writ of mandamus based only on the conclusion that it disagrees with the district court on a question of law.

In contrast, the decisions of this Court treat the writ of mandamus as an extraordinary remedy that is not to be used by the Circuit simply because it has concluded that the district court made an error of law. According to *Will v. United States*, "it is clear that only exceptional circumstances amounting to a 'judicial usurpation of power' will justify the invocation of this extraordinary remedy." 389 U.S. at 95. For example, a mandamus order is appropriate where a district judge has "displayed persistent disregard of the Rules of Civil Procedure." *Id.* However, *Will* also states that an error in a ruling on a matter within the jurisdiction of the district court is not a ground for mandamus. "*Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.' Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953). *Its office is not to*

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[4]Judge Jones' dissent also stated that the *Parker* test was the one that the majority had applied. App. A11.

*'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power.*" 389 U.S. at 104 (emphasis added).

In spite of the clear position of this Court that the mandamus remedy is to be narrowly confined and is not merely to search for reversible errors, "the circuits have consistently employed differing criteria for determining whether a writ should issue." 20 *Moore's Federal Practice* § 321.13[4] (1998). Thus, the Sixth Circuit uses the *Bauman* criteria generally, but it treats none as controlling. *In re Parker*, 49 F.3d 204, 207 (6th Cir. 1995). The Eighth Circuit also follows *Bauman*, but will issue a writ of mandamus if only three of the five criteria are present. *In re Bieter Co.*, 16 F.3d 929, 932 (8th Cir. 1994).

In contrast, the Seventh Circuit employs a two factor test that appears to be far less permissive than the *Bauman* criteria. According to its test, 1) there must be irreparable harm and 2) the disputed order must be unquestionably erroneous. It adheres more closely to this Court's stance in *Will* that the District Court's order must be more than mere legal error. According to the Seventh Circuit, "the order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or at least, patently erroneous." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995). The Fifth Circuit employs a similarly demanding mandamus standard. See *In re Stone*, 986 F.2d 898, 901 (5th Cir. 1993).

The petition for certiorari should be granted because the Sixth Circuit's permissive standard for granting mandamus relief has implications far beyond the circumstances of this case. The issuance of mandamus orders because of differing viewpoints on discovery matters invites appellate review of a wide range of

routine discovery disputes. Litigants in the Sixth Circuit now know that the Circuit is willing to use its mandamus power whenever it believes that the trial court's discovery ruling is based on an error of law. Such disagreements of law between circuit courts and district courts need not be confined to any particular aspect of discovery. Under the Circuit's current criteria, virtually every discovery dispute is a candidate for appellate review via mandamus proceedings. This can have a profoundly negative impact on all district courts' management of discovery. Significant additional judicial resources will have to be spent on mandamus proceedings. This, in turn, will generate significant delay.

There is no reason that the interlocutory character of discovery rulings should automatically make them candidates for mandamus proceedings. In fact, there is no harm in waiting until after trial to review most discovery rulings. If they are not sufficiently harmful to cause reversible error, it is unusual that they should be worthy of interlocutory review. In those few cases where there is a palpable harm that needs immediate attention, adherence to the explicit provisions of Rule 26 governing issuance of protective orders is preferable to increased review by resort to mandamus proceedings. Where the objecting party does not provide the District Court with evidence specific to the particular case that demonstrates why a protective order against discovery is necessary, mandamus should not be available. In this case, had the Circuit placed a burden of justification on the shoulders of ODRC officials, as required by Rule 26, rather than relying on conclusory statements in affidavits, the mandamus order would not have been granted.

In short, the grant of certiorari will give this Court an opportunity to identify correct, uniform criteria for the issuance of mandamus orders. This, in turn, will assure that mandamus

orders are not issued merely because of a difference of viewpoint between a district court and a court of appeals as to the correct rule of law to apply in discovery matters.

## II. THE MANDAMUS ORDER COMPELLING AUTOMATIC DEFERENCE TO THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION'S UNPUBLISHED "GENERAL RULE OF NON-ATTENDANCE" INTERFERES WITH THE DISTRICT COURT'S RESPONSIBILITY FOR MANAGEMENT OF DISCOVERY.

The petition for a writ of certiorari should also be granted because the Circuit's new requirement of deference to a department of corrections "general rule of non-attendance" is completely inconsistent with the duty of the District Court to manage discovery in a fashion that conforms to the Federal Rules of Civil Procedure. As a result of the Sixth Circuit's holding in this case, district judges must defer to objections by prison officials virtually every time an attorney representing an inmate in civil litigation seeks to have the inmate attend a deposition of a corrections employee. The requirement of such judicial deference interferes with the District Judge's responsibility to assure that discovery is expeditious. It also interferes with the District Judge's duty to assure that there be full disclosure of relevant information during the course of preparation for trial. The interference with the District Court's responsibility for case management results from the shift in control over the conduct of discovery depositions in inmate civil rights cases from district judges to prison administrators.

The Circuit's shift of control over important elements of discovery practice to corrections officials should not be permitted because it is completely inconsistent with the language

and the policies of the Federal Rules. It is clear that Federal Rules 16, 26, and 30 make it the responsibility of a district judge to manage the discovery in pending cases. According to Moore, Vestal and Kurland, *2 Moore's Manual: Federal Practice and Procedure*, § 16.02 (1998), "Rule 16 is explicitly intended to encourage active judicial management of the case development process of trial in most civil actions." In addition, "[u]nder Rules 26(c), and 30(d), the [district] court exercises a broad discretion to manage the discovery process in a fashion that will implement the philosophy of full disclosure of relevant information, and at the same time afford the participants due protection against the harmful side effects of disclosure." *Id.* at § 15.02[1].

The decisions of this Court over the last thirty years also make clear that it is the duty of district courts to supervise and manage the conduct of litigation before and during trial. In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-631 (1962), this Court stated, "control [is] necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." See also *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (mere error in district court discovery ruling is insufficient ground to justify appellate reversal). According to Professor Todd Peterson, "Building upon the foundation provided by the Rules and the Supreme Court elaboration of the Rules and the inherent power of the trial court judges, Federal district judges became increasingly active in managing discovery and the pretrial phases of the litigation. . . . The judge defines the contours of a case by orders that limit and direct discovery." Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. Davis L.Rev. 41, 67 (1995).

In spite of the indisputable duty of district courts to manage discovery in pending cases, the Sixth Circuit's decision in this

case shifts important management authority to corrections officials. Thus, according to the Circuit, a district court may not grant a motion by counsel for an inmate plaintiff that the inmate be allowed to attend a deposition of a corrections staff member, if corrections officials object. The objection must be honored even where it is unsupported by any evidence whatsoever, because, the Circuit Court argues, corrections officials have absolutely no burden to justify their objections. App. A8-A9. It makes no difference that the judge has concluded that the inmate's presence will be of significant assistance to his attorneys and will serve the interests of efficiency and fairness. It makes no difference that the judge has concluded that the evidence shows that the inmate is likely to behave appropriately during the deposition. And, it makes no difference that the party making the objections may gain a tactical advantage from the inmate's absence. The only exception to a district court's obligation to defer to departmental objections arises when the inmate litigant is able to meet the Circuit's ambiguous and extremely heavy requirement that he "demonstrate a specialized need." App. A9.

Until the "general rule of non-attendance" was adopted by the Circuit, a district court confronted by an inmate request to attend a deposition would serve as an impartial decision maker. The judge would weigh all applicable considerations and determine whether, under the circumstances, an inmate should be allowed to be present at a deposition. Now, under the "general rule of non-attendance," the weighing is to be done by prison administrators who have a direct and substantial interest in the outcome of the case.

The interest of prison administrators in the outcome of inmate civil rights cases needs little explanation. Prison administrators and their subordinates are frequently the defendants in such cases. If the administrators are the actual

defendants in a case where the plaintiff prevails against them, then there is a judicial finding that they have engaged in wrongdoing. Even if the subordinates are the only defendants, a judicial finding against the subordinate suggests that the administrators are not doing an adequate job of supervision. In either case, a judgment in favor of a plaintiff reflects badly on administrators.

The "general rule of non-attendance" allows administrators to take advantage of an inmate litigant by blocking attendance at depositions where the inmate can provide assistance to counsel. Thus, where an inmate with important information relevant to a deponent's answers can provide that information to counsel during a deposition, counsel can identify omissions, contradictions, or prevarications as they occur. A prison administrator's decision to invoke the "general rule of non-attendance," under such circumstances, obstructs counsel's access to information from the client when it is most needed and interferes with efforts to assure that the deposition is complete and accurate. This is especially true in litigation where the final disposition is to be made by summary judgment or, perhaps, at a trial that the inmate has no constitutional right to attend. *Price v. Johnson*, 334 U.S. 266, 285-286 (1948), overruled on other grounds by *McCleskey v. Zant*, 499 U.S. 467 (1991).

The better principles to govern such situations are to be found in the Federal Rules of Civil Procedure and in the Sixth Circuit's decision in *Collins*, decided by the Circuit three years prior to its ruling in this case. The Federal Rules give broad discretion to the district courts to manage discovery because district judges are impartial and can identify those situations in which an inmate's presence at a deposition will assist in achieving fairness and efficiency in a particular case. The Circuit's decision in *Collins* permitted district judges to engage

in case-by-case balancing in order to determine when the benefits of an inmate attending a deposition were outweighed by the burdens.

The Circuit's failure to recognize that the district judge is the best decision maker in discovery matters was a failure to apply this Court's teachings in *Crawford-El v. Britton*, 118 S.Ct. 1584 (1998). There, this Court emphasized the importance of avoiding appellate court imposition of categorical rules which interfered with district court management of litigation. In that case, this Court overturned a lower court decision that had created a special pleading rule to be used by the lower courts in prisoner rights cases. The special rule was rejected because it was contrary to the explicit language of the applicable Federal Rule of Civil Procedure and interfered with case management by the district courts. As this Court explained, "[g]iven the wide variety of civil rights and 'constitutional tort' claims that trial judges confront, broad discretion in the management of the fact-finding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals." 118 S.Ct. at 1598. See also *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 172-173 (1989)

The "general rule of non-attendance" approved by the Sixth Circuit in this case is the kind of categorical rule created by judicial interpretation that this Court rejected in *Crawford-El v. Britton*. Similarly, in *Whitlock v. Johnson*, 153 F.3d 380, 387 (7th Cir. 1998), the Seventh Circuit rejected a categorical rule banning the presence of live witnesses at prison disciplinary hearings because "case-sensitive administration" is preferable where important interests in procedural fairness are at stake. As a consequence, it is clear that the Sixth Circuit has exceeded its power over the conduct of litigation in the district courts. Review by this Court is necessary because the Sixth Circuit's

decision, allowed to stand, becomes a benchmark for other courts of appeals, and will interfere with district judges' duties to manage similar pending cases.

## III. THE PETITION SHOULD BE GRANTED BECAUSE THE CIRCUIT'S ADOPTION OF THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION'S "GENERAL RULE OF NON-ATTENDANCE" IS A SPECIAL RULE GOVERNING DISCOVERY BY INMATES WHICH VIOLATES RULES 26 AND 30 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

In addition to interfering with the District Court's responsibilities for case management, the Sixth Circuit's requirement that the District Court defer to the ODRC "general rule of non-attendance" also violates Rules 26 and 30 of the Federal Rules of Civil Procedure. Those Rules provide that, subject to the sound exercise of discretion by the district court, a plaintiff is allowed to attend the depositions taken in his case unless there is a concrete showing of "good cause" that he or she should not be allowed to attend. The Circuit's ruling completely abandons the Federal Rules by requiring an inmate's attorneys to demonstrate a special need when seeking to have an inmate client attend a deposition. The ruling simultaneously frees the objecting party of any burden of justification to show why the inmate should be excluded.

It is a well-established principle of discovery, under the Federal Rules, that a party is entitled to attend the depositions taken during the preparation of his case for trial. The leading commentators on the Federal Rules are in agreement on this point. According to Wright, Miller, and Marcus,

> [p]rior to 1970 the corresponding provision of what was then Rule 30(b) stated 'that the examination shall be held with no one present except the parties to the action and their officers and counsel.' By clear negative implication this was read to mean that the parties, their officers, and counsel could not be excluded. There is no indication that the Advisory Committee intended to change [this bar against exclusion] when it proposed the 1970 amendment.

8 *Federal Practice and Procedure*, § 2041 (1994). Similarly, according to *Moore's Federal Practice*, "it is generally recognized that a court may exclude a party from attending a deposition only in extraordinary circumstances." 6 *Moore's Federal Practice*, Third Edition, § 26.105[6] (1998).

The limits to the Rule 30(b) entitlement of a party to attend depositions are set forth in Rule 26(c) which requires that an objector, who seeks to exclude a party, obtain a protective order by making a showing of "good cause" supported by facts which are particular to the case for which the protective order is requested. *In re: Terre International*, 134 F.3d 302, 306 (5th Cir. 1998). The importance of the need for a particularized showing in order to obtain a protective order is explained by Wright, Miller, and Marcus in the following terms:

> [Rule 26(c)] requires that good cause be shown for a protective order. This puts the burden on the party seeking relief to show some plainly adequate reason therefor. *The courts have insisted on a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements, in order to establish good cause.* This recognizes that the existence of good cause for a protective order "is a factual matter to be determined from the nature and

> character of the information sought by deposition or interrogatory weighed in the balance of the factual issues involved in each action."

8 *Federal Practice and Procedure*, Second Edition, § 2035, pp. 484-486, quoting *Glick v. McKesson*, 10 F.R.D. 477, 479 (D.C.Mo. 1950) (emphasis added). See also 6 *Moore's Federal Practice*, Third Edition, § 26.104 ("The party requesting the protective order has the burden of demonstrating good cause.").

This is not to say that the applicable Federal Rules of Civil Procedure require that an incarcerated litigant may routinely attend depositions under the same circumstances as all other litigants. It is obvious that the fact that he is incarcerated must be taken into account. This difference in circumstance was recognized previously by the Sixth Circuit in *In re Collins* where it concluded that the Federal Rules of Civil Procedure permitted an inmate litigant to attend depositions in his case only after the District Court balanced five relevant countervailing factors on a case-by-case basis.[5] App. A22.

*Collins* was the law of the Sixth Circuit at the time that the attorneys sought permission for the inmate plaintiff to attend some of the depositions in his own case. As already indicated, when ODRC officials objected to his attending any depositions,

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[5] According to *Collins*, "The relevant factors include the costs and security risks involved in transporting the inmate to the deposition site and in maintaining his presence at the deposition, the importance of the testimony of the deponent to the claims alleged, the need for the inmate to be physically present during the deposition, the inmate's individual security history, general security issues, and the availability of alternative means to accommodate the concerns of both the inmate and prison officials. The District Court should weigh *all* of the relevant factors in exercising its discretion." (emphasis added). App. A22.

the District Judge carefully used *Collins's* five-factor balancing tests and determined that, under the specific circumstances of the case, permission for the inmate to attend four depositions being taken at the institution where the inmate was incarcerated should be granted. The District Court was persuaded to grant permission in accordance with *Collins* because the depositions in question were likely to be crucial to impending ODRC motions to dispose of the case on summary judgment.

Of particular importance was the fact that ODRC made no effort to comply with Rule 26(c) by making a particularized showing that there was "good cause" to deny the request by Plaintiff's counsel that he attend the depositions. The Department relied, almost exclusively, on general argumentative statements in affidavits which contended that no inmate should ever be allowed to attend a deposition of a corrections officer because the inmate's presence undermined staff authority. Indeed, the only affidavit containing specific references to the inmate plaintiff in this case is conclusory in nature. It asserts that the plaintiff is "aggressively litigious" and only files lawsuits to harass corrections officials.[6] App. A41.

In short, for the District Court to honor the ODRC's objections and exclude the plaintiff from attendance at the depositions, it would have had to rely on stereotyped and speculative generalizations about the inherent harm of letting any

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[6]If there was a genuine concern about harassing or frivolous litigation, ODRC could have requested appropriate judicial remedies. It is the business of the federal judiciary and Congress, not state prison administrators, to redress abuses of the right of access to the Federal Courts. This is especially true where an inmate is represented by counsel. Under such circumstances, Rule 11 of the Federal Rules of Civil Procedure provides potent sanctions that are applicable to attorneys, as well as clients.

inmate attend a deposition of a corrections staff person in all cases. This, in turn, would have required the District Court to ignore the duty of care imposed by this Court to avoid undue reliance on the statements by experts which are speculative in nature and beyond their expertise. As pointed out in *General Electric v. Joiner*, 118 S.Ct. 512, 519 (1997):

> Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)] or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

The core defect in the ruling by the Sixth Circuit is that by compelling automatic judicial deference to the ODRC "general rule of non-attendance," the Circuit has amended Federal Rules 26(c) and 30 and by judicial interpretation has created a special Federal Rule which is only applicable to depositions of inmate litigants. Its creation of a special rule of civil procedure to govern inmate litigants is impermissible. Circuit courts do not have authority to create special rules by means of judicial interpretation.

This Court's opinions make clear that the Federal Rules apply equally to all litigants. Its opinions have consistently overturned lower court constructions of the Federal Rules which have the effect of creating special rules for different classes of litigants. Thus, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), this Court reversed a lower court ruling creating a special pleading standard for civil rights cases that was not found in the Federal Rules of Civil Procedure. In *Leatherman*, the district court had

dismissed civil rights complaints because they failed to meet a "'heightened pleading standard' imposed by the decisional law of the Court of Appeals. . . ." 507 U.S. at 164. This Court held that it was impossible to square the judicially created special pleading requirement with the explicit language of the Federal Rules of Civil Procedure. Its opinion contained the reminder that any change in pleading requirements "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." 507 U.S. at 169.

The Court took a similar position in *Gomez v. Toledo*, 446 U.S. 635 (1980). There, it overturned a court of appeals ruling that imposed a special pleading rule that required that civil rights complaints must contain specific allegations of bad faith official conduct. The Court held that the court of appeals' ruling was in error because the special pleading requirement was not imposed by the applicable civil rights statute or Federal Rules of Civil Procedure, and was "contrary to established practice in analogous areas of the law." 446 U.S. at 641.

Notwithstanding these decisions, the Sixth Circuit's ruling in this case requires that a district court hearing an inmate's civil rights case construe Federal Rules 26(c) and 30 as if they contained special provisions for inmates. It abandons the provisions of the Federal Rules which govern litigants' attendance at depositions in their cases. It particularly abandons the Rule 26(c) requirement that corrections officials support their objections with concrete information rather than generalized statements of preference. Such rule-making is the business of Congress. It is beyond the power of the courts of appeals, and it is certainly beyond the power of the Ohio Department of Rehabilitation and Correction.

Because such rule making is the business of Congress and not a power of a court of appeals or of corrections officials, review is appropriate in this case to protect the integrity of the Federal Rules and assure that they remain the authoritative rules governing the conduct of discovery in the District Courts.

## CONCLUSION

For the foregoing reasons, District Judge Ann Aldrich urges this Court to grant the petition for a writ of certiorari filed in this case.

Respectfully submitted,

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**In re Reginald WILKINSON; State of Ohio, Department of Rehabilitation and Correction; Janet Yarrow; Lois Rathwell-Love; Dr. Francisco Leano; Roberta Winkle; Marla Armstrong; Bennie Kelly; and Norm Rose, Petitioners.**

**No. 96-4133.**

United States Court of Appeals,
Sixth Circuit.
Argued Sept. 8, 1997.
Decided March 5, 1998.

Todd R. Marti (argued and briefed), Office of Attorney General, Corrections Litigation Section, Columbus, OH, for Petitioners.

Rita S. Eppler (argued and briefed), Worthington, OH, for Respondent Ann Aldrich.

Thomas A. Downie (argued), Jori B. Naegele (briefed), Robert D. Gary (briefed), Gary, Naegele & Theado, Lorain, OH, for Plaintiff Joseph A. Smith.

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

ALAN E. NORRIS, J., delivered the opinion of the court, in which MERRITT, J., joined. NATHANIEL R. JONES, J. (pp. 916-19), delivered a separate dissenting opinion.

## OPINION

ALAN E. NORRIS, Circuit Judge.

This action challenges the district court's decision ordering Ohio prison officials to permit an inmate to

attend a pretrial deposition conducted as part of a civil action brought by the inmate. Petitioners seek a writ of mandamus (in the nature of a writ of prohibition) directing the district court to vacate its order. The question presented is whether plaintiff Joseph Smith, an inmate at the Lorain Correctional Institution ("LORCI"), has shown a specialized need to attend a pretrial deposition, a need that outweighs the safety and security concerns of the state prison system. We conclude that he has not.

I.

Plaintiff brought actions against Janice Yarrow, Staff Librarian at LORCI, Norman Rose, Warden at LORCI, and four other prison officials at LORCI, alleging violations of the Eighth Amendment and denial of access to legal materials. Plaintiff's actions were brought pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and 18 U.S.C. §§ 241 and 242. The district court consolidated plaintiff's three actions and appointed counsel to represent him.[1] Soon thereafter, defendants filed a consolidated motion for summary judgment that was denied without prejudice. Further discovery was then ordered.

During the discovery process, the parties agreed that certain defendants would be deposed and that the depositions would take place at LORCI. Plaintiff, who hoped to attend the depositions, was notified by officials from

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[1] Plaintiff is no stranger to the litigation process. In the last four years alone, he has pursued six lawsuits in federal courts, filing more than 241 *pro se* motions, memoranda, and other pleadings. These motions included 19 requests for extraordinary injunctive relief.

the Ohio Department of Rehabilitation and Correction ("O.D.R.C.") that he would not be allowed to attend. Due to the perceived difficulties in maintaining security, safety, and order in its correctional institutions, the O.D.R.C. has adopted a number of practices intended to prevent disturbances. These include the policy of not permitting inmates to be present when their counsel deposes prison staff members. The O.D.R.C. cites five reasons for the deposition policy: (1) maintaining staff authority; (2) preventing the aggrandizement of inmates; (3) avoiding unnecessary tension; (4) protecting staff morale; and (5) preserving limited resources. The O.D.R.C. does permit inmates to confer privately with counsel before and after depositions, as well as by telephone during the depositions. According to petitioners, plaintiff had nearly two years to confer with counsel, and telephone communication between counsel and himself was to take place during the depositions.

Plaintiff filed a Motion To Order Defendants To Permit Plaintiff To Attend Depositions In His Case. In the course of granting the motion, the district court acknowledged that a prisoner has no constitutional right to attend depositions in civil actions, but concluded that plaintiff was entitled to attend the depositions in this case in light of the factors outlined in *In re Collins*, 73 F.3d 614 (6th Cir.1995). Petitioners then filed a Petition for Writ of Mandamus with this court. The proceedings in district court have been stayed pending the outcome of this action.

II.

This court is asked to issue a writ of mandamus ordering the district court to vacate its order. *See* 28 U.S.C. § 1651 ("all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). Mandamus directed at a district court is an extreme remedy that this court utilizes only in extraordinary situations. *See In re Parker*, 49 F.3d 204, 206 (6th Cir.1995). For a writ to issue, we must be presented with a demonstrable abuse of discretion or conduct amounting to usurpation of judicial power. *See id.* Discovery rulings that raise "questions of unusual importance necessary to the economical and efficient administration of justice" are appropriate for review in mandamus. *Federal Deposit Ins. Corp. v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir.1990). Because depositions are important to the proper completion of discovery and an improper ruling by the district court in this case could be said to hamper the economical and efficient administration of justice, this matter is appropriate for review in mandamus.

We begin with the fundamental rule that an incarcerated plaintiff has no constitutional right to attend the depositions taken in his civil action. *In re Collins*, 73 F.3d at 615. The reasoning supporting the rule was articulated by the Supreme Court nearly a half century ago:

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by § 272 of the Judicial Code, 28

> U.S.C. § 394 [now 28 U.S.C. § 1654] to parties in all courts of the United States to "plead and manage their own causes personally."

*Price v. Johnston*, 334 U.S. 266, 285-86, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948), *overruled on other grounds by McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). We often have employed the Supreme Court's reasoning in the context of limits placed upon prison inmates' participation in their own civil litigation. In fact, in *Holt v. Pitts*, 619 F.2d 558 (6th Cir.1980), this court noted that "[g]enerally speaking, prisoners who bring civil actions, including prisoners who bring actions under the rights statute, 42 U.S.C. § 1983, have no right to be personally present at *any* stage of the judicial proceedings." *See Holt*, 619 F.2d at 560 (emphasis added).

We also recognize that the administration of state prisons is a matter consigned to the states as part of their sovereign power to enforce the criminal law. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) ("it is difficult to imagine an activity in which a state has a stronger interest, or one that is more intricately bound up with state laws, regulations, or procedures, than the administration of its prisons"); *United States v. Michigan*, 940 F.2d 143, 155 (6th Cir.1991). In the exercise of this authority, the state has the power to adopt policies it believes are best suited for managing its prisons and assuring the safety and security of those institutions.

In opposing plaintiff's motion for an order permitting him to attend the depositions, the state defendants presented to the district court evidence of the reasons that warrant its adoption of the deposition attendance

policy. They also submitted an affidavit from James G. Ricketts, Ph.D., a person they say qualifies as an expert in the field of prison administration. In Ricketts' opinion:

> Although there are many requirements for maintaining safety, security, and order within a prison, there are at least five that would be directly implicated by allowing inmates to be present at the deposition of staff members. Those include the need to consistently reinforce the superior/subordinate relationship between staff and inmates, the need to prevent inmates from having an opportunity to distinguish themselves amongst the inmate population, the need to avoid unnecessary tension between inmates and staff, the need to avoid circumstances and situations which undermine staff confidence, the need to efficiently utilize the limited resources available to a correctional institution.

According to Ricketts, staff authority is undermined when inmates are allowed to confront and challenge staff members during depositions, albeit through their attorneys. Permitting inmates to attend depositions will likely result in their attempt to distinguish or aggrandize themselves within the inmate population, with the result, says Ricketts, that they become more difficult to control. Furthermore, the confrontational nature of a deposition intensifies the underlying dispute between the inmate and staff member, increasing the strain between parties who frequently come in close contact with one another during normal prison routine. Ricketts concludes that staff confidence and morale likely will be undermined when staff members are confronted and challenged during depositions. This would also result in staff members

becoming more reluctant to "exercise their lawful authority towards inmates with a reputation for litigiousness, thereby significantly limiting their effectiveness." Finally, the costs of inmate litigation significantly drain the resources available to prisons. According to Ricketts, the ability to "grill" staff members through depositions would provide a powerful motivation for inmates to file additional claims against prison staff.

Apparently, the district court concluded that the points raised in Ricketts' affidavit did not amount to valid security concerns, as the court noted that it was "not persuaded . . . that general security is compromised when inmates are permitted to attend hearings in which they perceive themselves to be on equal footing with their superiors, unnecessary tension is created, staff confidence is undermined and resources are not efficiently utilized." We disagree and conclude that the reasons relied upon by the department were adequate to justify its deposition policy.

Despite petitioners' compelling arguments that justify the existence of the deposition policy, the general rule embodied in that policy cannot serve to ban inmate attendance at depositions in their own civil actions in all instances. Under some circumstances an inmate may be able to make a specialized showing of the necessity of his attending a particular pretrial deposition. And, when an inmate can demonstrate that his circumstances should invoke an exception to the general rule, federal courts have the power, in the exercise of their discretion, to issue a writ requiring penal authorities to produce the prisoner at federal civil litigation proceedings. *Holt v. Pitts*, 619 F.2d at 561.

In order to attend a pretrial deposition, then, the inmate has the burden of producing evidence that will convince the district court that his attendance at this particular deposition is required. This includes a demonstration that his physical presence will contribute significantly to a fair adjudication of his claim. *Id.* Furthermore, when determining whether the prisoner has made a specialized showing of need, the court must consider the interests of prison officials as well as the inmate. *Collins*, 73 F.3d at 615. In *Collins*, we outlined the relevant factors a district court should weigh in exercising its discretion in making this determination. The factors formulated in *Collins* include:

> [T]he costs and security risks involved in transporting the inmate to the deposition site and in maintaining his presence at the deposition, the importance of the testimony of the deponent to the claims alleged, the need for the inmate to be physically present during the deposition, the inmate's individual security history, general security issues, and the availability of alternative means to accommodate the concerns of both the inmate and the prison officials.

*Id.* This formulation allows the district court to consider both the interests of the inmate in attending the deposition and of the prison system in maintaining security and safety in the prison.

In granting plaintiff's motion to attend the depositions, the district court improperly placed the burden upon petitioners to establish that plaintiff *should not* be permitted to attend. In lieu of citing any evidence that

plaintiff may have put forward to argue that his attendance was necessary, the court observed that "although there is no absolute need for Smith to be physically present during these depositions, . . . Smith may be able to assist his attorneys with personal knowledge and facts that are relevant to his case. . . . " After discussing the *Collins* factors in the context of assigning to petitioners the task of demonstrating that plaintiff should not attend the deposition, the court concluded that "Smith's presence at the depositions could contribute significantly to the fair adjudication of his claims." These observations come nowhere near what is required for a prisoner to show that his circumstances demonstrate a specialized need for an exception to be granted to the general rule of non-attendance. Otherwise, the exception would swallow up the general rule, since a prisoner would nearly always be able to demonstrate that his presence at a deposition "may" prove beneficial to his counsel and "could" contribute to a fair adjudication.

III.

Accordingly, we conclude that the district court abused its discretion in ordering the petitioners to permit Smith to attend the depositions. The petition for the writ of mandamus is **granted** to the extent that the order of the district court is **vacated** unless Joseph Smith is able to make the specialized showing of need required by this opinion.

NATHANIEL R. JONES, Circuit Judge, dissenting.

I am troubled by the majority's willingness to vary from well-established procedure by imposing upon the

district court's discretion to grant a routine order permitting an inmate prisoner to attend a deposition in his civil case and, further, placing the burden on that inmate to articulate reasons why he should be empowered to attend the depositions at issue. In light of my concerns, I respectfully dissent.

In this case, the prison officials had sufficient notice of the deposition dates to notify the district court of their desire to exclude Smith on the basis of an unwritten policy against prisoner attendance. Yet, petitioners chose to notify respondent Smith of their objections to his presence just two days prior to the commencement of the depositions at issue. Upon their refusal, Smith filed a motion to attend the depositions, which would have been held on the prison grounds. By issuing a writ of mandamus, I believe that the majority today has stripped *Collins* of its approach to limiting prisoner attendance in cases in which such attendance would be impractical or perfunctory in favor of a rule that presumes that prisoners may not attend depositions absent a special showing of need. With that in mind, I cannot agree that a writ of mandamus is an appropriate remedy.

I note at the outset that a district court is given substantial discretion over pretrial matters such as the conduct of discovery. *See Chemical & Indus. Corp. v. Druffel*, 301 F.2d 126, 129 (6th Cir.1962) ("Under the rules, the extent of discovery and the use of protective orders is clearly within the discretion of the trial judge."); *see also Lewelling v. Farmers Insurance of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir.1989) ("The district court's decisions to award sanctions and issue a protective order are within the broad discretion of the district court in managing the

case."); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1505 (11th Cir.1985) ("A trial court has wide discretion in determining the scope and effect of discovery.").

As the majority rightly points out, the writ of mandamus is a drastic remedy and may be invoked only in cases where a petitioner can demonstrate a clear and indisputable right to the relief sought. *See Will, U.S. District Judge v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62, 98 S.Ct. 2552, 2556-57, 57 L.Ed.2d 504 (1978); *In re Parker*, 49 F.3d 204, 206 (6th Cir.1995). In considering the appropriateness of the writ, this circuit has borrowed a guideline approached [sic] used by the Ninth Circuit, which takes into account five factors, including: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error, or manifests persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems, or issues of law of first impression. *In re Bendectin Products Liability Litig.*, 749 F.2d 300, 303-304 (6th Cir.1984) (citing *Bauman v. United States District Court*, 557 F.2d 650, 654 (9th cir.1977)). We must balance these factors to determine that a writ of mandamus is required. *Id.* Upon such consideration, I conclude that such an extreme remedy is unwarranted here. Conceding the first two factors for the sake of argument, the final three factors all weigh in favor of the respondents.

First, I do not believe that the trial court clearly erred by granting the order permitting Smith's attendance. The

*Collins* case, a decision of this court heavily relied upon by the majority, demands that a district court balance the interests of the prison staff and the prisoner, not simply the former. *In re Collins*, 73 F.3d 614, 615 (6th Cir.1995). An examination of the records shows that the district court dutifully considered both interests in weighing the five factors deemed relevant in that decision, including (1) the costs and security risks involved in transporting a prisoner to a deposition cite and in maintaining his presence at a deposition; (2) the importance of the testimony of the deponent to the claims alleged, the need for a prisoner to be physically present during a deposition; (3) the inmate's individual security history; (4) general security issues; and (5) the availability of alternative means to accommodate the concerns of both parties. *Id.* In its written memorandum on the issue, the district court detailed its conclusions as to each *Collins* factor, as the following passage indicates:

> The parties do not dispute that the depositions which Smith hopes to attend will be taken at LORCI, where Smith is being housed. Therefore, the costs and security risks involved in transporting Smith to the deposition site and maintaining his presence there are negligible, if not existent. . . .
>
> Second, these deponents are important to the claims alleged because they are all named defendants in Smith's lawsuit. Moreover, although there is no absolute need for Smith to be physically present during these depositions, the importance of the testimony makes Smith's argument for physical presence more persuasive. Smith may be able to assist his attorneys

with personal knowledge and facts that are relevant to his case but which may not have been specifically communicated to his attorneys. In addition, defendants have failed to demonstrate that Smith is a security risk. . . . In *In re Collins*, the Circuit found that plaintiff's "extensive history of violent and disruptive behavior" was a compelling reason for denying him physical access to depositions in his civil case. *Collins*, 73 F.3d at 616. Here, because there is no evidence that Smith has a similar history of violent and disruptive behavior, there is no compelling reason to deny him access.

This Court is not persuaded by defendant's argument that general security is compromised when inmates are permitted to attend hearings in which they perceive themselves to be on equal footing with their superiors, unnecessary tension is created, staff confidence is undermined and resources are not efficiently utilized. The fact that the Circuit has created a balancing test indicates that these general security concerns are but one factor to be weighed.

Finally defendant's claim that adequate alternatives are available to Smith. For instance, prison officials have agreed to allow Smith to confer with his attorneys before and after the depositions and have offered to allow Smith to communicate telephonically with his attorneys during the depositions. Such measures, however, seem impractical. Smith's attorneys would be forced to call him whenever they needed certain information or assistance, which would only prolong the depositions. Moreover, it is not clear how the attorneys are supposed to know when Smith has information to offer. Even if

> these were adequate, the fact that Smith is not an individual security risk, the importance of the testimony of those deposed, and the fact that the depositions are scheduled to be taken at LORCI weigh heavily on this Court's decision to allow Smith to be physically present. J.A. at 143-45 (Memorandum and Order).

Given this thorough, well-reasoned analysis, I cannot conclude that the district court's decision comprised clear error. To the contrary, in my judgment, the district court properly considered and decided the issue. In *Collins*, the prison officials submitted evidence of Collins' disruptive behavior, while Collins himself failed to submit contradictory evidence. *Collins*, 73 F.3d at 615. While *Collins* appears to encourage some demonstration by an inmate that his presence will significantly contribute to the adjudication of his claims, I read that case to require such a showing only upon an objection by the prison officials rather than as a matter of course. Once prison officials object, *Collins* requires that the district court engage in a careful balancing of factors, as I believe the district court did here. In short, I find that the majority has inserted a presumption where the plain intent of the *Collins* court appears to have been to create a flexible approach.

The prison officials have submitted generalized security concerns, as evidenced by the affidavit of Dr. James G. Ricketts, as the sole basis of the district court's alleged error requiring mandamus relief. The majority decision, which relies solely upon these general concerns, turns the rule of *Collins* on its proverbial ear by placing such general concerns – concerns that will be present in every case

involving an inmate plaintiff – above the other four factors. Henceforward, every inmate plaintiff will have to demonstrate special reasons why his or her attendance is necessary. Finally, Smith has not requested access to a deposition away from the prison grounds as in *Holt v. Pitts*, 619 F.2d 558 (6th Cir.1980), nor does Smith appear to have an extensive history of disruptive conduct as an inmate as the prisoner in *Collins*. For these reasons, I am firm in my belief that the district court did not clearly err.

Second, I believe that the district court decision was consistent with the federal rules and thus did not offend the fourth factor of the mandamus standard by manifesting a disregard for the federal rules. Rule 26(c) of the Federal Rules of Civil Procedure allows a trial court to issue an order to exclude parties from a deposition, including a party to the litigation, upon a showing of good cause. *See, e.g., Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir.1973) (excluding a party on the finding there was cause to believe he would harass the deponent, and he had demonstrated a complete disregard for the judicial process); *Hamon Contractors, Inc. v. District Court*, 877 P.2d 884, 887 (Colo.1994) (finding the exclusion of a party from pretrial depositions is only permitted rarely and under extraordinary circumstances); *BCI Commun. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, 157 (N.D.Ala. 1986) (finding that there must be a proper showing to exclude a party from a deposition, and that this should be a rare event); *In re Levine*, 101 B.R. 260, 262-63 (Bankr.D.Colo.1989) (allowing exclusion of parties from each other's depositions under "rather extraordinary" circumstances); *Beacon v. R.M. Jones Apartment Rentals*, 79 F.R.D. 141, 142 (N.D.Ohio 1978) (finding, under particular

circumstances which involved "subtle and sophisticated questions," good cause existed to exclude parties to the suit from attendance at the deposition). The majority rightly points out that inmate plaintiffs are not entitled to the same deference as civil plaintiffs. *Maj. Op.* at 914. However, this court has always limited such rights only to the extent necessary to avoid denying inmate plaintiffs "adequate means of securing redress for violations of their constitutional rights." *Holt v. Pitts*, 619 F.2d 558, 559-560 (6th Cir.1980). The majority decision limits inmate plaintiff redress by (1) presuming that the inmate plaintiff may not attend a deposition in his or her case and (2) placing the burden on the inmate plaintiff to demonstrate special circumstances (presumably a sufficient showing under *Collins*) requiring his or her attendance. These limitations drastically reduce the chance that a prisoner will be present during deposition testimony, even in circumstances where his or her presence would be critical to the merits of the case. I do not read *Collins* or *Holt* to require these extreme limitations, and it is clear that federal rules do not impose such limitations.

Moreover, the prison officials in this case could have submitted a Rule 26(c) motion to exclude Smith and, in fact, had several months prior [sic] the scheduled dates of the depositions to do so.[1] They did not file such a motion. Instead, they unilaterally refused to allow the depositions to proceed with Smith physically present, forcing Smith

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[1] Indeed, it would seem that an official prison policy excluding inmates from depositions would have been raised by the petitioners earlier than the critical moment in which the depositions were to take place.

to request the order granted in this case.[2] Permitting the prison officials to now excuse their actions based on general security concerns, where they failed to invoke the remedy afforded them under the federal rules, is at the very least dubious.

Finally, as to the fifth mandamus factor, I am not prepared to assert that the district court has raised new and important questions of law. I believe that today's majority decision, however, may do so. The decision of the majority presents yet another barrier to the bringing of civil complaints by inmates, placing the burden of proof upon inmates to show special circumstances necessitating their attendance at such depositions. While prisoners are not afforded a constitutional right to attendance, neither are civil plaintiffs given such a right, as evidenced by the existence of Rule 26(c). Further, I do not read *Collins* or *Holt* to place the burden on an inmate plaintiff to justify his attendance absent a formal objection by the defendants. Thus, the presumption-based rule adopted by the majority today ensures that our already overburdened district courts will have to entertain a *Collins* hearing in every single case involving an inmate plaintiff.

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[2] Smith's request might be better considered as a motion to compel enforcement of a prior order (the discovery calendar sanctioned by the district court) or a response to a Rule 26(c) motion to exclude as evidenced by the petitioner's refusal to permit his attendance. Either way, the district court properly exercised its discretion and, in the latter instance, fairly weighed the *Collins* factors to find in favor of Smith.

The unfortunate result rendered today casts an ominous cloud over inmate participation in civil case discovery and district court discretion in managing pretrial orders in similar civil cases. I cannot support a grant of mandamus relief where the district court followed the settled rules of law based on the facts before it. Accordingly, **I DISSENT**.

**In re Terry L. COLLINS, Warden, et al., Petitioners.**

**No. 95-3861.**

United States Court of Appeals,
Sixth Circuit.

Submitted Sept. 8, 1995.

Decided Nov. 1, 1995.*

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Todd R. Marti, Office of the Attorney General of Ohio, Columbus, OH, for Petitioners.

Before: CONTIE, NELSON, and RYAN, Circuit Judges.

PER CURIAM.

Petitioners – the warden of the Southern Ohio Correctional Facility, the State of Ohio through the Ohio Department of Rehabilitation and Correction, and the four defendants in this prisoner's civil rights action – seek a writ of mandamus directing the district court to vacate two pretrial discovery orders providing that the plaintiff be permitted to attend the defendants' depositions. The district court submitted a copy of its docket sheet in response to the petition. On September 14, 1995, the court directed responses to the petition, and plaintiff has filed a response opposing the relief sought by petitioners. Discovery rulings that raise "questions of

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* This order was originally issued as an "unpublished order" filed on November 1, 1995. On January 3, 1996, the court designated the opinion as one recommended for full-text publication.

unusual importance necessary to the economical and efficient administration of justice" may be reviewed in mandamus. *Federal Deposit Insurance Corp. v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir.1990). This case poses such a question.

Plaintiff is an inmate at the Southern Ohio Correctional Facility. The prison is the state's maximum security prison and houses the state's most dangerous and disruptive inmates. The prison was the site of a prison riot in April of 1993 in which nine inmates and a prison guard were killed. Plaintiff initiated this civil rights action against four correction officers employed at the prison, asserting violations of his constitutional rights when they allegedly beat him and threw him down a set of stairs. Plaintiff sought to depose the four defendants at the prison facility. The defendants objected to plaintiff's presence at the depositions on the grounds of increased security risks and costs. On June 13, 1995, the district court granted plaintiff's motion to compel his attendance at the depositions. The defendants, at that time, relied solely on general security concerns in opposing plaintiff's motion to compel. Thus, there was no evidence before the court that plaintiff was a security risk. After the court's ruling, defendants moved to alter or amend the order, submitting substantial evidence of the security risk posed by plaintiff. The district court denied the motion to alter or amend, finding that it was untimely and that defendants failed to submit sufficient evidence to permit amendment of the order. Due to the compelling nature of the evidence submitted by the defendants, the district court abused its discretion in denying the motion to alter or amend the June 13 order.

Plaintiff has an extensive history of violent behavior since he entered prison in February of 1992. He has been found guilty of fighting eight times and of threatening the staff three times. Since 1992, he has been found guilty of disobeying a direct order of prison officers or staff seventeen times and of instigating disturbances twelve times. In 1993, while incarcerated at the Lebanon Correctional Institution, plaintiff instigated a very serious disturbance involving twelve other inmates which resulted in the disruption of three prison ranges and significant property damage. In addition, plaintiff has been verbally abusive and threatening both in his criminal proceedings in the district court and during disciplinary proceedings at the prison. On November 23, 1993, the day of the alleged incident giving rise to plaintiff's civil rights claims, plaintiff was removed from a special prison disciplinary proceeding due to his violent outburst against the disciplinary officials.

Plaintiff has no constitutional right to attend the depositions of the defendants in this action. *Holt v. Pitts*, 619 F.2d 558, 560-61 (6th Cir.1980). As stated by the Supreme Court

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by § 272 of the Judicial Code, 28 U.S.C. § 394 [now 28 U.S.C. § 1654] to parties in all courts of the United States to "plead and manage their own causes personally."

*Price v. Johnston*, 334 U.S. 266, 285-86, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). In determining whether to permit an inmate to attend pretrial depositions in a civil case the court must consider the interests of the inmate and the prison officials. The relevant factors include the costs and security risks involved in transporting the inmate to the deposition site and in maintaining his presence at the deposition, the importance of the testimony of the deponent to the claims alleged, the need for the inmate to be physically present during the deposition, the inmate's individual security history, general security issues, and the availability of alternative means to accommodate the concerns of both the inmate and the prison officials. The district court should weigh all of the relevant factors in exercising its discretion.

The defendants submitted compelling evidence demonstrating that the presence of plaintiff at the depositions would pose a security risk and a threat to the integrity of the prison. Plaintiff, as an incarcerated individual, should demonstrate that his "physical presence will contribute significantly to a fair adjudication of his claims." *Holt v. Pitts*, 619 F.2d at 561. Although plaintiff argues that his presence at the depositions is essential, the state has agreed to provide counsel access to plaintiff during the course of the depositions. Because of the compelling interest of the state in maintaining security at its penal institutions and plaintiff's extensive history of violent and disruptive behavior, the district court's orders will be vacated.

In light of this conclusion, we need not address the petitioners' argument that the district court lacks jurisdiction over Warden Collins, plaintiff's custodian, and thus

could not order him to produce plaintiff at the depositions, or their argument that the Eleventh Amendment prevents the court from issuing injunctive relief against the state.

It therefore is **ORDERED** that the petition for a writ of mandamus is granted and the district court is directed to deny plaintiff's motion to compel and to vacate the orders of June 13, 1995, and August 9, 1995, compelling plaintiff's attendance at defendants' depositions.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| JOSEPH SMITH,<br>Plaintiff,<br>vs.<br>JANICE R. YARROW, et al.,<br>Defendants. | ) | Case No. 1:94 CV 2028<br><br>MEMORANDUM AND ORDER |

ALDRICH, J.

Joseph Smith brings this action pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and 18 U.S.C. §§ 241, 242 against Janice Yarrow, Staff Librarian at the Lorain Correctional Institution (LORCI); Norman Rose, Warden at LORCI, and four other prison officials at LORCI alleging, *inter alia*, violations of the Eighth Amendment and denial of access to legal materials. Smith now moves this Court to issue a writ, pursuant to 28 U.S.C. § 1651, to permit him to attend pre-trial depositions in his civil case. For the following reasons, this Court grants Smith's motion.

I.

Smith, an inmate at LORCI, was employed at the main law library as a clerk. At that time he was supervised by Janice Yarrow who was concerned about Smith's conduct at LORCI. Specifically, Yarrow felt that Smith disobeyed orders directed at him and stated that she feared for her safety when Smith was working in the main library. Notwithstanding Yarrow's complaints, there

is no evidence that Smith was found guilty of any institutional rule violation at LORCI. According to Smith, Yarrow ordered him to carry heavy objects despite his hernia, and discriminated against him because of his race. Smith also believes that medical personnel wrongly denied him access to medical care and that prison officials retaliated against him for his grievances by denying him access to legal materials. Eventually, Smith was reassigned to another institutional job at a separate library within the facility. Smith filed three separate actions. Because the actions involved common questions of law and fact, this Court consolidated them.

Smith was scheduled to attend the depositions of the named defendants in this lawsuit, but was notified, prior to the depositions, that his physical presence would be prohibited because he had an attitude problem. The only issue currently before this Court is whether Smith is entitled to be physically present at these pretrial depositions.

II.

Generally speaking, prisoners have no constitutional right to attend depositions in their civil actions. *In re Collins*, 73 F.3d 614, 615 (6th Cir. 1996) (citation omitted). However, a court may in its discretion permit a prisoner to attend a pre-trial deposition. Factors to consider are: (1) the costs and security risks involved in transporting the inmate to the deposition and in maintaining their presence at the deposition; (2) the importance of the testimony of the deponent to the claims alleged; (3) the need for the inmate to be physically present during the

deposition; (4) the inmate's individual security history; (5) general security issues, and; (6) the availability of alternative means to accommodate the concerns of both the inmate and prison officials. *Id.* "The district court should weigh all of the relevant factors in exercising its discretion." *Id.* In all cases, a writ should only be issued if the prisoner's physical presence will contribute significantly to the fair adjudication of his claims. *Id.* at 615-16 (*quoting Holt v. Pitts*, 619 F.2d 558, 561 (6th Cir. 1980)). Considering the factors delineated in *In Re Collins*, this Court finds that Smith is entitled to attend the depositions of the named defendants in his civil case.

The parties do not dispute that the depositions which Smith hopes to attend will be taken at LORCI, where Smith is being housed. Therefore, the costs and security risks involved in transporting Smith to the deposition site and maintaining his presence there are negligible, if not nonexistent. *Cf. Holt v. Pitts*, 619 F.2d at 561 (denying plaintiff's motion to attend a preliminary hearing because it would have required penal authorities to transport the inmate from California to Tennessee).

Second, these deponents are important to the claims alleged because they are all named defendants in Smith's lawsuit. Moreover, although there is no absolute need for Smith to be physically present during these depositions, the importance of the testimony makes Smith's argument for physical presence more persuasive. Smith may be able to assist his attorneys with personal knowledge and facts that are relevant to his case but which may not have been specifically communicated to his attorneys. In addition, defendants have failed to demonstrate that Smith is a security risk. Defendants emphasize Yarrow's concern

that Smith was intimidating her at the law library, but her subjective belief alone is insufficient to convince this Court that Smith is a threat to the security of LORCI. Likewise, although Smith was given two rule violation citations while incarcerated at the Columbus Correctional Facility, defendants have submitted no evidence concerning the nature of these violations and this Court will not speculate as to what these were. Defendants have also produced no evidence that Smith has violated any rule infractions at LORCI. Although defendants contend that Smith's use of the litigation process is harassing, this Court does not agree that an inmate who continually files civil rights lawsuits is a security risk to an institution. In *In re Collins*, the Circuit found that plaintiff's "extensive history of violent and disruptive behavior" was a compelling reason for denying him physical access to depositions in his civil case. *Id.* at 616. Here, because there is no evidence that Smith has a similar history of violent and disruptive behavior, there is no compelling reason to deny him access.

This Court is not persuaded by defendants' argument that general security is compromised when inmates are permitted to attend hearings in which they perceive themselves to be on equal footing with their superiors, unnecessary tension is created, staff confidence is undermined and resources are not efficiently utilized. The fact that the Circuit has created a balancing test indicates that these general security concerns are but one factor to be weighed. *See id.* at 615.

Finally, defendants claim that adequate alternatives are available to Smith. For instance, prison officials have agreed to allow Smith to confer with his attorneys before

and after the depositions and have offered to allow Smith to communicate telephonically with his attorneys during the depositions. Such measures, however, seem impractical. Smith's attorneys would be forced to call him whenever they needed certain information or assistance, which would only prolong the depositions. Moreover, it is not clear how the attorneys are supposed to know when Smith has information to offer. Even if these were adequate, the fact that Smith is not an individual security risk, the importance of the testimony of those deposed, and the fact that the depositions are scheduled to be taken at LORCI weigh heavily on this Court's decision to allow Smith to be physically present. In other words, these factors point to the conclusion that Smith's presence at the depositions could contribute significantly to the fair adjudication of his claims. *See id.* at 615-16 (citation omitted).

Next, defendants argue that the Eleventh Amendment bars the Court from ordering injunctive relief against a state. However, "[t]he Eleventh Amendment is not a bar to injunctive relief against the defendants in their official capacities." *Wolfel v. Morris*, 972 F.2d 712, 719 (6th Cir. 1992). Although plaintiff cannot directly sue the state of Ohio or its departments for declaratory, injunctive, or monetary relief, Smith does not purport to do so. *See Thiokol Corp. v. Dept. of Treasury*, 987 F.3d 376, 381 (6th Cir. 1993).

Defendants also allege that this Court lacks jurisdiction to order non-party state officials to produce Smith at his deposition. Surely the power of federal courts to impose duties upon third parties is not without limits, but 18 U.S.C. § 1651 may be used to effectuate and

prevent the frustration of orders previously issued by a court in its exercise of jurisdiction otherwise obtained. *State of Mich. v. City of Allen Park*, 954 F.2d 1201, 1217 (6th Cir. 1992) (citation omitted). In addition, "[t]his statutory provision empowers the federal courts to issue writs requiring penal authorities to produce prisoners at judicial proceedings in civil cases." *Holt v. Pitts*, 619 F.2d at 561. Although the persons ultimately responsible for producing Smith are not named parties, they are not "so far removed from the underlying controversy that [their] assistance could not be permissively compelled." *United States v. New York Telephone Co.*, 434 U.S. 159, 175 (1977). This Court recognizes that § 1651 is not an independent basis for jurisdiction, but in the present case, the issuance of a writ is necessary to effectuate this Court's decision to allow Smith to attend the depositions.

Finally, defendants claim that Federal Rule of Civil Procedure 26(c)(5) justifies Smith's exclusion from the depositions. In relevant part, Rule 26(c)(5) gives this Court the authority to order "that discovery be conducted with no one present except persons designated by the court," assuming that good cause is established. However, this rule does not compel the Court to issue such an order. Rather, it must be read in concert with the factors delineated in *In Re Collins*. Having concluded that Smith is entitled to attend the depositions in light of this standard, this Court finds that good cause cannot be shown for excluding him pursuant to Fed. R. Civ. P. 26(c)(5).

This Court would remind the parties that a "district court's decisions to . . . issue protective orders are within the broad discretion of the district court in managing the case." *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d

212, 216 (6th Cir. 1989). Therefore, should any conflict arise throughout these depositions, this Court, in its discretion and upon motion by a party, may take appropriate steps to ensure the fair and safe conduct of these depositions.

III.

For the foregoing reasons, the Court grants Smith's motion to attend the depositions of the named defendants.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES
DISTRICT JUDGE

## AFFIDAVIT OF JAMES G. RICKETTS

County of Maricopa :
: ss
State of Arizona :

Now comes James G. Ricketts, having been first duly sworn, and states and affirms as follows:

1. He has more than 12 years of experience in the management or correctional facilities and correctional systems. His experience includes service as the superintendent of both medium and maximum security facilities and a reception facility. He was also responsible for all aspects of the operations of the Arizona and Colorado Departments of Corrections as the chief operating officer of those departments.

2. In addition to his substantial years of hands on experience in the management of correctional facilities, he has also provided consultation services to a number of correctional systems across the United States, including the Ohio Department of Rehabilitation and Correction ("O.D.R.C."). He has also benn [sic] appointed as an expert consultant by the United States District Court for the Northern district of Ohio. He has taught college and graduate level courses on corrections at various colleges and universities. His experience and education is more fully described in Exhibit A hereto. His work for O.D.R.C. has been both system wide and with regard to specific correctional institutions. He is personally familiar with conditions at Lorain Correctional Institution ("Lor.C.I."). He has been deposed between fifteen to twenty times. He has attended many court proceedings where inmates were present when prison staff

were interrogated and observed the behavior of both the inmates and staff members after they have returned to prison. As a result of those experiences and training and his experience in correctional management experience described in paragraph 1 above, he has personal knowledge of the matters set forth herein.

3. Maintaining security, safety, and order in a modern prison is a very demanding task. There are several reasons for that. First, there are generally a much larger number of inmates within a particular institution than there are staff. Secondly, the inmate population is by nature very difficult to control, being made up of individuals who have demonstrated their propensity for disruptive and anti-social conduct. Thirdly, there are many important and competing demands on the limited pool of staff available to maintain safety, security, and order within a prison. Finally, there is an inherently tense environment within a prison due to the fact that most persons within the prison do not desire to be there, the close proximity and lack of privacy between inmates and the resulting resentment between inmates *inter se* and between inmates and staff.

4. Maintaining safety, security, and order within a reception center, such as Lor.C.I., is even more difficult than it is in most prisons. There are several reasons for this. First, most inmates in a reception institution are new to the prison environment and exhibit greater adjustment problems than would be observed in other prisons. That manifests itself in more behavior problems. In addition, there is a high level of turnover as

new inmates are received, processed, and reassigned to their permanent institution. That makes it more difficult for staff members to become familiar with the behavioral patterns and needs. Furthermore, staff are charged with the additional task of indoctrinating new, mostly undisciplined inmates to the pressing need of conforming to the rules, routine, and authority of staff members that are essential if safety, security, and order are to be maintained within the institution. The cumulative result of those realities is that staff at a reception facility are under more pressure than are staff at other facilities. Another result is that adherence to the norms of prison discipline becomes even more important if order is to be maintained in the more fluid environment of a reception facility.

5. Although there are many requirements for maintaining safety, security, and order within a prison, there are at least five that would be directly implicated by allowing inmates to be present at the deposition of staff members. Those include the need to consistently reinforce the superior/subordinate relationship between staff and inmates, the need to prevent inmates from having an opportunity to distinguish themselves amongst the inmate population, the need to avoid unnecessary tension between inmates and staff, the need to avoid circumstances and situations which undermine staff confidence, the need to efficiently utilize the limited resources available to a correctional institution.

6. It is extremely difficult to maintain safety, security, and order within a prison if a superior/

subordinate relationship is not consistently reinforced between staff and inmates. There are several reasons for that. First, there are many more inmates within a given institution than there are staff charged with maintaining safety, security and order. Secondly, the inmate population consists of individuals who have, by definition, demonstrated their propensity for anti-social and disruptive conduct and inability to adhere to rules devised before the common good. Thirdly, the logistical and legal realities controlling today's prisons limit the utilization of technological means and sheer force in maintaining control within a prison. If staff are to maintain safety, security, and order their authority must be consistently reinforced. The need for the consistent reinforcement of staff authority is analogous to that of a judge with regard to contemptuous litigants. Although a judge has the ability to ultimately coerce compliance with his or her mandates, resort to such coercion undermines the court's ability to perform its core function as humanely and efficiently as it otherwise could.

7. The requisite authority of staff over inmates can only be observed if that authority is consistently maintained. Conversely, that authority is undermined if inmates are placed in a position where they perceive themselves as being on equal or superior footing with staff, even on a temporary basis. Although there may be situations in which such equality is required, those situations have a very real and lasting effect on staff's ability to maintain control over those inmates after those circumstances have ended.

8. A prime example of the problems described in paragraph (7) above is behavior routinely observed in connection with inmates involved in litigation. He has repeatedly, and very regularly, observed inmates that become much more unruly and difficult to manage upon returning from court proceedings. Upon their return from such proceedings those inmates routinely boast to fellow inmates about having "put it to" the staff at the proceedings and seem to feel compelled to act more belligerently and rebelliously towards staff in order to establish the truth of their claims to fellow inmates.

9. It is his belief that the problems described in paragraphs (7) and (8) above will result, and accelerate, if inmates are allowed to attend depositions of staff members. Depositions are inherently confrontational proceedings in which the deponent is in a subordinate position to the party taking the deposition. Staff deponents are forced to answer questions posed by inmates' counsel and such proceedings frequently become rather tense, invasive and heated. Although the inmate himself would not be asking the questions, allowing him to vicariously experience such an interrogation of staff would likely cause the type of problems described in paragraphs (7) and (8) above.

10. Another key component in maintaining safety, security, and order in a modern prison is to prevent inmates from distinguishing themselves within the inmate population. There are several reasons for this. First, the sheer number of inmates within a given institution requires a high degree of uniformity in inmate behavior and staff treatment of inmates if the prison is to

be managed in an orderly, fair and efficient manner. Secondly, inmates which are perceived, or perceive themselves, as being distinguished from the general population of inmates are generally much more difficult to manage, exhibiting a higher degree of resistance to staff authority. Thirdly, inmates who are treated differently from their peers often become the target of resentment from their peers, endangering the inmate and creating additional security and management problems for prison staff.

11. One way in which inmates attempt to distinguish themselves is by developing reputations as aggressive "jailhouse lawyers." Inmates often file a large number of suits and/or aggressively pursue claims without regard to their underlying merit because they believe it will result in such a reputation. Such a reputation is desirable among the inmate population because it provides a basis for increased status within that population and also provides a means whereby the inmate can increase his standard of living (i.e., provide legal services in exchange for cigarettes, illicit sexual activities, illegal drugs, and other types of "currencies" within the prison environment).

12. Allowing such inmates to attend the depositions of staff members will likely increase the type of behavior described in paragraph (11) above. Because of the fact that a prison is a closed environment and because of the deposing inmate's interest in enhancing his reputation, word of the proceeding will likely spread amongst the inmate population with rapidity, encouraging the type of problem described in paragraph 11 above.

13. Because of the crowded conditions, adverse ratios of inmates to staff and the potential human costs of failing to do so, it is imperative that tension between inmates and staff be kept at the minimum feasible level. It is easier to manage a prison with a lower degree of tension because inmates are less resistant to staff authority within such an institution. Furthermore, a lower level of tension within an institution reduces the possibility of violence and resulting physical injury.

14. There are several key ingredients to maintaining a lower level of tension within an institution. One of the most important is the perception that all inmates are treated equally. Another is that the authority of staff members is uniformly exercised and reinforced.

15. Allowing inmates to be present at the depositions of staff members would likely increase tension within a correctional institution. Because of their inherently confrontational nature, allowing inmates to be present at such proceedings will likely increase the emotional intensity of the underlying dispute for both parties. That would result in increased resistance and hostility on the part of the plaintiff/inmate towards defendant/staff members and increase resentment on the part of the defendant staff members towards the inmate. That would increase the strain in the relationship between those individuals, who will be in frequent and close contact with each other during normal prison routine. That could also result in problems such as either the perception of or reality of overly strict enforcement of institutional rules towards the deposing

inmate which in turn could lead to other problems such as increased resistance by the inmate and other collateral disputes and related proceedings (i.e., institutional grievances and disciplinary proceedings, additional lawsuits, etc.). Furthermore, because of the closed nature of the prison environment, that increased tension will likely affect the relationships between other inmates and staff. That result is not hypothetical. He has personally observed that occurring numerous times in situations where inmates either personally confronted staff in court proceedings or were present when their counsel did so.

16. It is very difficult to maintain safety, security and order within a prison if staff lack confidence in their ability to fulfill their basic functions. Like all workers, prison staff are not as productive when they are "gun shy." however [sic] the extremely demanding environment within which prison staff work provides less of a margin for error, thereby aggravating the effects of any lack of confidence on the part of staff members.

17. Allowing inmates to be present at the depositions [sic] the staff members will likely undermine staff confidence. Depositions are inherently invasive proceedings, forcing the deponent to reveal much information that would normally not be disclosed in the presence of an inmate. They are also inherently unequal, with the deponent being placed in a subordinate position in relation to the deposing party and being deposed in the presence of an inmate will make it more difficult for the individual staff members to subsequently exercise authority

over the plaintiff/inmate, thereby making their jobs that much more difficult. Finally, the increased emotion that such proceedings generate will not be pleasant for the staff member. The combined effect of those negative consequences would be to make staff members more reticent to exercise their lawful authority towards inmates with a reputation for litigiousness, thereby significantly limiting their effectiveness. In contrast, removing the possibility of such confrontations will make it easier for staff members to function normally.

18. Another key requisite to maintaining safety, security, and order within the prison environment is the efficient utilization of resources. Prison administrators are repeatedly asked to do more with less, spreading available resources more and more thinly. One way in which needed resources are diverted, with very little resulting benefits, is inmate litigation.

19. Inmate litigation constitutes a significant drain on the resources available to prison administrators. Staff must be diverted from otherwise pressing tasks to respond to discovery requests, to testify, and to assist their attorneys in the preparation of their cases. Furthermore, thousands of dollars are spent each year at each of Ohio's 28 correctional institutions on copying and overtime expenses in order to respond to discovery requests and to transport inmates to and from court proceedings. Moreover, the seeming impunity with which inmates commence groundless lawsuits has a very real, and adverse, effect upon the morale of staff. Last, but very certainly not least, taxpayers in Ohio and other jurisdictions spend millions of dollars

annually in attorneys' fees and related expenses defending against prisoner lawsuits.

20. Although some prisoner lawsuits have merit, the vast majority are pursued for secondary advantage, such as retaliating against or harassing staff members. Anything which increases inmates ability to obtain such secondary advantage will increase the frequency with which inmate litigation will occur. The ability of an inmate to "grill" staff members through depositions, even vicariously through counsel, would be very popular amongst the inmate population and would provide powerful motivation for filing otherwise meritless claims.

Further affiant sayeth naught.

/s/ James G. Ricketts
JAMES G. RICKETTS

Sworn to before me and subscribed in my presence this 21 day of May, 1996.

/s/ Becky [Illegible]
NOTARY PUBLIC
My Commission Expires
Feb. 23, 1998
State of AZ
County of Maricopa

## AFFIDAVIT OF MARC HOUK

County of Lorain :
: ss
State of Ohio :

Now comes Marc Houk, having been first duly sworn, and states and affirms as follows:

1. Is the administrative assistant to the warden at Lorain Correctional Institution ("Lor.C.I."). Prior to assuming that position he was the Inspector of Institutional Services. As a result of his duties in that position he has personal knowledge of the matters set forth herein.

2. One of his duties is to facilitate the efforts of the Ohio Attorney General to respond to lawsuits filed by inmates against staff members of Lor.C.I. As a result of those duties he is aware of all such litigation.

3. Inmate Joseph Smith, #211-195 ("Smith"), is one of the most litigious inmates at Lor.C.I. and is far more litigious than most inmates at Lor.C.I. Based on the volume of Smith's lawsuits, his familiarity with the way that Smith handles his lawsuits and his personal observation of Smith, It [sic] is his opinion that Smith uses the litigation process to harass staff members at Lor.C.I.

4. A prime example of Smith's vexatious approach to the litigation process can be found in two very similar incidents in connection with the cases of *Smith v. Yarrow*, Case No. 1:94CV2028 (N.D. Ohio) and *Smith v. Yarrow*, Case No. 1:95CV0083 (N.D. Ohio). In Case No. 1:94CV2028 Smith had a number of subpoenas *duces tecum* served on four staff members at Lor.C.I., requesting the production of a large

volume of documents. Lor.C.I. staff spent a considerable amount of time gathering the requested documents and produced them for Smith's review at 8:00 on February 1, 1995. Smith refused to examine the documents. In Case No. 1:95CV0083 Smith had five subpoenas *duces tecum* served on various staff members at Lor.C.I. requesting the production of a large volume of documents on or before April 5, 1995. Many of the documents requested had been previously subpoenaed and produced in Case No. 1:94CV2028, as just discussed. Nonetheless, staff at Lor.C.I. once again spent considerable time assembling the requested documents and produced them for Smith's review at 2:45 p.m. on April 3, 1995. Smith refused to review the documents, claiming that "he didn't have time." He obviously enjoyed both situations.

5. Smith has a reputation of being an aggressively litigious inmate among the staff at Lor.C.I. He is personally aware of situations in which Lor.c.I. [sic] staff have attempted to avoid contact with Smith or otherwise altered their normal work patterns because of that reputation.

6. He has no interest in the outcome of the cases of *Smith v. Yarrow*, Case Nos. 1:94CV2028, 1:95CV0083 (N.D. Ohio) [Illegible].

Further affiant sayeth naught.

/s/ Marc Houk
MARC HOUK

Sworn to before me and subscribed in my presence this 30th day of May, 1996.

/s/ Cathleen A. Little
NOTARY PUBLIC
Cathleen A. Little
My Commission Expires 3-26-97

Supreme Court, U.S.
FILED
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**Case Numbers 98-827, 98-6890**

**In The**
**SUPREME COURT OF THE UNITED STATES**
**October Term 1998**

**IN RE: ANN ALDRICH,**

*Petitioner,*

**JOSEPH SMITH,**

*Petitioner,*

**v.**

**REGINALD WILKINSON, *et al.*,**

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# CONSOLIDATED BRIEF IN OPPOSITION TO CERTIORARI

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## STATEMENT OF THE CASE

Petitioner Smith is a state prisoner with a long history of abusive behavior. Outside of prison, he subjected between ten and twenty women to violent sexual assaults. Once in custody, he apparently sublimated those urges into litigation, filing multiple lawsuits and barraging courts and corrections officials with hundreds of pleadings. His litigation history includes multiple requests for injunctive relief and demonstrated abuse of the discovery process. To date, none of his actions have been found to have merit.

These petitions spring from Smith's latest cases, a set of three largely duplicative *pro se* actions under 42 U.S.C. § 1983 filed in late 1994 and early 1995 against the Respondents, all of whom are officials or employees of the Ohio Department of Rehabilitation and Correction ("ODRC"). Smith deluged the Respondents with 387 conventional discovery requests and multiple *ex parte* subpoenas *duces tecum* but refused to examine the documents produced pursuant to those requests and subpoenas.

Petitioner Aldrich, the district judge presiding over the cases, appointed counsel for Smith in April 1995. Shortly after counsel was appointed, the Respondents provided Smith's counsel with copies of their responses to Smith's *pro se* discovery requests, answered further discovery requests from Smith's counsel and filed a consolidated motion for summary judgment, effectively giving Smith a "road map" to their case.

The cases were essentially dormant until the spring of 1996. At that time, Smith's counsel sought to take the Respondents' depositions. The Respondents agreed, but pursuant to standing ODRC policy, objected to Smith being

present at those proceedings. Pursuant to that policy, Smith was free to confer with his counsel both before and after the depositions and the Respondents offered to provide telephonic contact between Smith and his counsel during the depositions.

That was unsatisfactory to Smith's counsel and a motion was filed to compel Smith's presence at the depositions. The motion did not explain what about the cases uniquely required Smith's presence or why the prior discovery and alternate arrangements were insufficient to enable his counsel to take meaningful depositions. Instead, the only explanation given was the generalized statement by one of his attorneys that she "find[s] it to be of great assistance to [her] to have [her] clients' at [her] side, as they contribute significantly during the deposition by listening to the testimony and advising [her] on the spot as to certain issues."

The Respondents replied to that motion by producing evidence of Smith's individual history of abusive behavior and of the disruptive effects that would likely follow from allowing prisoners to attend the depositions of corrections staff. More specifically, they produced evidence from corrections officials with more than sixty years' experience indicating that allowing inmates to attend depositions would likely:

-- Undermine the supervisory authority of staff.

-- Provide a means for litigious inmates to aggrandize themselves within the prison population.

-- Cause needless tension between staff and prisoners.

-- Make staff more reticent to exercise their lawful authority.

-- Waste limited resources.

A portion of that evidence is reproduced at pages A31-A40 of the petition in Case No. 98-827. None of that evidence was objected to or rebutted. In spite of that lopsided record, Judge Aldrich ordered that Smith must be allowed to attend the depositions.

Because of the very real problems described in above, the Respondents sought relief from that order by filing a petition for mandamus or prohibition in the Sixth Circuit. Smith responded with legal arguments but no new evidence. Judge Aldrich, assuming the role of an active litigant, also filed several briefs in opposition to mandamus.

The Sixth Circuit granted the relief requested, holding that prisoners have the burden of proving that they have a specialized need to attend depositions conducted by their attorneys. That holding was based upon the Sixth Circuit's conclusion that the penological concerns motivating the Respondents' position were "compelling". That court further held that the non-specific reasons advanced by Smith's counsel in support of his presence were insufficient to overcome those concerns and remanded the matter to the District Court to give Smith an opportunity to show a particularized need to be present at the depositions.

Instead of availing himself of that option, Smith, joined by Judge Aldrich, sought *en banc* review in the Court of Appeals. When that was denied, they filed the petitions at bar.

## REASONS FOR DENYING THE WRIT

The Petitioners essentially raise two sets of issues: whether the Sixth Circuit applied the correct mandamus standard and whether its decision improperly divests the district courts of authority over discovery in prisoner cases. On a general level, both groups of issues have been effectively mooted by legislative action. There are also specific reasons why those issues are individually unworthy of review.

### A. The Issues Presented Have Been Effectively Mooted by the Prison Litigation Reform Act.

It is well settled that *certiorari* is reserved for the resolution of "important federal questions." See Rule 10 of this Court. The issues raised by the Petitioners do not rise to that level because they have been effectively mooted by the Prison Litigation Reform Act, P.L. 104-134, 110 Stat. 1321 ("PLRA"). That is true in two respects.

First, the PLRA has made it very unlikely that the matters at bar will ever arise again. Their importance is limited to a very specific category of cases, prisoner civil rights cases. The sheer number of prisoner cases has rapidly declined following passage of the PLRA. A. Meehan, *Judicial Business of the United States Courts: 1997 Report to the Director*, (Administrative Office of the United States Courts at 131-132), Table C-2A (noting a 31 percent decline in prisoner civil rights suits in FY 1997). Of that class of

cases, most do not involve depositions taken by counsel, as a recent study has noted that "virtually all" litigating prisoners act as their own attorneys and that 74 percent of such cases are dismissed *sua sponte*. R. Hanson and H. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, (Bureau of Justice Statistics, U.S. Dept. of Justice 1995) at 17-19. In short, the decision below involved a very minute percentage of a very insular category of cases that is declining in over all number. Hence, it does not constitute an "important federal question."

Second, the PLRA's changes to 18 U.S.C. § 3626 preclude district courts from exercising the discretion the Petitioners seek to vindicate. Section 3626(a)(1) prohibits federal courts from granting prospective relief that is not necessary to protect a federal right, and the type of relief ordered by Petitioner Aldrich clearly fits within the broad definition of "prospective relief" provided by § 3626(g)(7). This Court's decisions make it clear that prisoners have no federal right to be physically present at any stage of a civil proceeding. *Price v. Johnson*, 334 U.S. 266, 285-286 (1948); see also *Schwab v. Berggren*, 143 U.S. 442, 449 (1892). Consequently, the type of discretion that the Petitioners seek to preserve has been removed by statute, and their arguments are therefore moot.

### B. The Petitioners' Arguments Regarding Mandamus Standards Are Not Properly Before the Court and Raise Nothing More Than Harmless Error.

Both Petitioners ask this Court to review the mandamus standard applied by the Sixth Circuit, as set forth in *In re Parker*, 49 F.3d 204, 206 (6th Cir. 1995). There are two compelling reasons to deny that request.

The first is that the issue was not raised below. The Sixth Circuit, acting with an abundance of caution, asked the parties to brief the propriety of mandamus relief twice before ruling. Both times the Respondents advanced *In re Parker* as the proper standard. The Petitioners did not contest the *Parker* standard either time and hence neither the Sixth Circuit nor the Respondents have had an opportunity to address the issue. Therefore, it is not appropriate to raise the matter for the first time in this Court and *certiorari* should be denied on that ground alone.

Second, even if *Parker* does not provide the correct standard, any reliance upon it was harmless. The alternate standard urged by the Petitioners is the "usurpation of power" test that some courts have derived from *Will v. United States*, 389 U.S. 90 (1967). However, as discussed below, that standard would also require the result reached below because Judge Aldrich's order constituted a usurpation of power when it is evaluated in the light of this Court's decision in *Lewis v. Casey*, 518 U.S. 347 (1996). Therefore, review would be futile given the mandate of 28 U.S.C. § 2111.

### C. The Extent of District Courts' Discretion was Conclusively Resolved in *Lewis v. Casey*, 518 U.S. 347 (1996).

Both Petitioners contend that *certiorari* is appropriate because the Sixth Circuit's decision deprived Smith of discovery-related rights afforded normal litigants, arguing that decision improperly divests district courts of discretion in such matters. However, review on those issues is unwarranted because this Court's decision in *Lewis v. Casey*, 518 U.S. 343 (1996), has already resolved the relative

authority of the courts and correctional officials and the decision below was consistent with *Lewis*.

In *Lewis*, this Court reviewed a district court's order that corrections officials modify operating procedures to accommodate prisoners' litigation-related "rights." *Lewis* held, *inter alia*, that federal courts lacked Article III authority to order such modifications if prisoners do not show actual injury to their ability to prosecute non-frivolous claims regarding the fact, duration of conditions of their confinement. That limitation was imposed to prevent federal courts from improperly taking authority over matters reserved for the executive branch of government and to prevent district courts from "usurp[ing] authority over the prison administrator's core responsibility: institutional security and order," *Id.* at 391 (Thomas, J., concurring). *Lewis* also held that even if such injury is shown, no relief may be granted if the procedures causing the injury were reasonably related to legitimate penological interests under the test set forth in *Turner v. Safley*, 482 U.S. 78 (1987).

In the case at bar, the Sixth Circuit examined the record and determined that Smith made no showing that his ability to prosecute his § 1983 actions was hindered by his being excluded from the depositions. That alone deprived the district court of Article III authority, and hence discretion, to grant the relief requested and indicated that Judge Aldrich's order constituted a "usurpation of power." Moreover, the Sixth Circuit's decision is supported by the fact that the Respondents produced unrefuted evidence establishing "compelling" penological reasons for excluding Smith from the depositions. In sum, the issues raised by Smith have been conclusively resolved by this Court. That provides additional grounds for denying *certiorari*.

## CONCLUSION

The Respondents ask that this Court deny certiorari in these cases.

Respectfully submitted,

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